

2015 Annual CalHR Conference

Building the Bridge Between Reasonable Accommodation, Protected Leave, and Return to Work

Scenario: Employee, who is pregnant, changes her behavior and begins regularly arriving late to work. Supervisor notices and talks to Employee about the tardiness. Employee responds that she hurt her back moving boxes a few weeks ago, and has been going to medical appointments. Also, Employee's doctor thinks Employee needs a job change.

1) Of what significance is it, if any, whether Employee hurt her back on duty or off duty?

For workers' compensation purposes?

For Reasonable Accommodation purposes?

2) What requires Employer to make reasonable accommodation to Employee?

California Statutes governing Reasonable Accommodation

CA Government Code section 12940 states, "It shall be an unlawful employment practice....:

(m) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.

(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.

CA Government Code section 12926.1, subdivision (m), defines physical disability, as follows:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) “Limits” shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) “Major life activities” shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) “Physical disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

CA Government Code section 12926.1, subdivision (j), defines mental disability, as follows:

(1) Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

(A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

"Mental disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

Government Code section 12926, subdivision (u), defines Undue Hardship as an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed.

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.

(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.

(5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.

3) Now that Supervisor is aware Employee has an injury, what, if any, are Supervisor's obligations?

An employee's request for a reasonable accommodation may use plain English and need not mention or use the phrase reasonable accommodation; both sides must communicate directly, exchange essential information, and neither side can delay or obstruct the process. (*Rowe v. City & County of San Francisco* (N.D.Cal.2002) 186 F.Supp.2d 1047.)

An employer's obligation under California's Fair Employment and Housing Act (FEHA) to engage in an interactive process is triggered when the employee gives the employer notice of the disability and a desire for a reasonable accommodation. (*Reese v. Barton Healthcare Systems* (E.D.Cal.2010) 693 F.Supp.2d 1170.)

Under Fair Employment and Housing Act (FEHA), if the qualified employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available, and the employer has a duty to reassign the disabled employee if an already funded, vacant position at the same level exists, but a reassignment is not required if there is no vacant position for which the employee is qualified. (*Furtado v. State Personnel Board* (2013) 212 Cal.App.4th 729.)

A reassignment is not required as a reasonable accommodation under the California Fair Employment and Housing Act (FEHA) if there is no vacant position for which a disabled employee is qualified; the obligation to reassign an employee does not require creating a new job, moving another employee, promoting the disabled employee, or violating another employee's rights under a collective bargaining agreement. (*Taylor v. Trees, Inc.* (E.D.Cal.2014) 2014 WL 5781251.)

Employers are not obligated to create new “light-duty” positions for disabled employees. (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1223.)

Where an employer does not regularly do so, an employer is not required by the California Fair Employment and Housing Act (FEHA) to make permanent any temporary positions that were created. (*Taylor v. Trees, Inc.* (E.D.Cal.2014) 2014 WL 5781251.)

An employer is not required by the California Fair Employment and Housing Act (FEHA) to exempt an employee from performing essential functions or to allocate essential functions to other employees in order to find a reasonable accommodation for a disabled employee. (*Taylor v. Trees, Inc.* (E.D.Cal.2014) 2014 WL 5781251.)

3) In making a request for reasonable accommodation, what obligations does Employee have? (duty to explain her disability, and cooperate with Employer’s efforts to accommodate Employee’s limitations.)

A disabled employee making a claim making a claim under the Fair Employment and Housing Act (FEHA) retains a duty to cooperate with the employer's efforts to accommodate the employee's limitations by explaining his or her disability and qualifications. (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215.)

4) What constitutes a "reasonable" accommodation?

“Reasonable accommodation” of a plaintiff's disability, under Fair Employment and Housing Act (FEHA), means a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired. (*Scotch v. Art Institute of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986.)

Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as: (1) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; (2) Job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions.’ (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 947.)

Under the California Fair Employment and Housing Act (FEHA), when more than one accommodation is reasonable, it is the employer's prerogative to choose

which accommodation will be utilized. (*Jadwin v. County of Kern* (E.D.Cal.2009) 610 F.Supp.2d 1129.)

Any reasonable accommodation is sufficient to meet employer's obligation to accommodate employee's religious beliefs; however, employer need not adopt most reasonable accommodation nor must employer accept remedy preferred by employee. (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345.)

Employer reasonably accommodated delivery driver's wrist injury, as required by California Fair Employment and Housing Act (FEHA), where it offered him position doing telephone surveys which he declined, it allowed him to do special deliveries for two months at his old rate of pay, it left his job open for a year to allow him to reclaim it after surgery, and he would not have been able to do required lifting even if it had provided him with cart. (*Watkins v. Ameripride Services* (2004) 375 F.3d 821.)

An employer's responsibility under the California Fair Employment and Housing Act (FEHA) to reassign a disabled employee who cannot be otherwise accommodated does not require creating a new job, moving another employee, promoting the disabled employee, or violating another employee's rights under a collective bargaining agreement (CBA), but it nevertheless does entail affirmative action. (*Swonke v. Sprint Inc.* (N.D.Cal.2004) 327 F.Supp.2d 1128.)

For purposes of a disability discrimination claim under the Fair Employment and Housing Act (FEHA), employer did not satisfactorily "accommodate" employee's request for reassignment to a different position by requesting that she apply for a management trainer position and advising her that she should continually check a job hot line; the reasonable accommodation requirement is affirmative in nature. (*Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376.)

Former employer had an affirmative duty under the ADA and the California Fair Employment and Housing Act (FEHA) to explore further arrangements to offer a reasonable accommodation for medical transcriptionist with obsessive compulsive disorder (OCD) before terminating her; although employer had already allowed transcriptionist a flexible start time, the accommodation was ineffective and transcriptionist had requested a work-at-home position or a leave-of-absence. (*Humphrey v. Memorial Hospitals Ass'n* (C.A.9 (2001) 39 F.3d 1128.)

Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an

'undue hardship.' (*Sargent v. Litton Systems, Inc.* (N.D.Cal 1994) 841 F.Supp. 956, 960.)

State Personnel Board Appeal Process for Denial of Reasonable Accommodation:

2 CCR § 53.2, Reasonable Accommodation Denial Complaints are Assigned to Investigative Review Process: (no hearing conducted, and a Hearing Officer reviews relevant evidence to render a decision, unless the Chief ALJ deems a hearing appropriate (2 CCR § 53.3(3).)

2 CCR § 64.1, Discrimination; Harassment; Retaliation; Denial of Reasonable Accommodation: (authorizes RA denial complaint with SPB)

Any state civil service employee, or applicant for state civil service employment, who reasonably believes that he or she has been subjected to discrimination, harassment, retaliation, or denied reasonable accommodation for a known physical or mental disability in state employment, on any basis listed in section 19701 or 19702 of the Government Code, or subdivision (a) of section 12940 of the Government Code, as those bases are defined in Sections 12926 and 12926.1 of the Government Code, may file a complaint by complying with the provisions of Sections 64.2 through 64.6.

2 CCR § 64.2, Prerequisites for Filing a Discrimination Complaint with the Board

Any state civil service employee or applicant for state civil service employment who reasonably believes that he or she has been subjected to discrimination, harassment, retaliation, or denied reasonable accommodation for a known physical or mental disability in employment shall first file a written complaint with the appointing power's Equal Employment Opportunity Office, or other office or individual designated by the appointing power to investigate such complaints, prior to filing a discrimination complaint with the SPB.

2 CCR § 64.3 Appointing Power Discrimination Complaint Process:

(a) Each appointing power shall establish in writing its own internal discrimination complaint process through which a complainant may obtain review of, and a written response to, an allegation of discrimination, harassment, retaliation, or denial of reasonable accommodation for a known physical or mental disability.

(b) Each complaint filed with the appointing power shall be in writing and shall state the facts upon which the complaint is based, and the relief requested, in sufficient detail for the appointing power to understand the nature of the complaint and to determine the individuals involved. The complained of act, omission, event, decision, condition, or policy must have occurred no more than one year prior to the date that the complaint is filed with the appointing power. This period may be extended by not more than 90 days in those cases where the complainant first obtained knowledge of the facts of the alleged discrimination more than one year from the date of its occurrence.

2 CCR § 64.4 Response of Appointing Power to Discrimination Complaint:

(a) The appointing power shall provide the complainant a written decision within 90 days of the complaint being filed. If the appointing power has not completed its review and/or is unable to provide a written decision within the 90 day time period, the appointing power shall, within that same time period, inform the complainant in writing as to the reason(s) it is unable to issue its decision within the required time period.

(b) Upon the expiration of the 90 day time period stated in this section, complainant may thereafter file a discrimination complaint with the SPB as provided in section 64.5. However, a discrimination complaint may not be filed with the SPB more than 150 days after the complainant filed his or her complaint of discrimination with the appointing power.

2 CCR § 64.5 Requirements for Filing Discrimination Complaint with the SPB:

Any complaint to the SPB alleging discrimination, harassment, retaliation, or denial of reasonable accommodation for a known physical or mental disability shall be subject to the following filing requirements:

(a) The complaint shall be filed with the Appeals Division within 30 days of the date the appointing power served its decision concerning the complaint of discrimination on the Complainant. If the appointing power has failed to provide a decision to the Complainant within 90 days of the complaint being filed, the Complainant may file a complaint with the Appeals Division within 150 days of the date the Complainant filed his or her complaint of discrimination with the appointing power.

(c) The complaint shall be in writing, and shall:

(1) identify the facts that form the basis for the complaint, including, but not limited to the specific protected classification or activity as set forth in sections 19701 or 19702 of the Government Code; all discriminatory acts experienced by the Complainant, including the date that each act occurred; the name and job title of each person who allegedly subjected Complainant to each discriminatory act; and all information that the Complainant possesses that shows that the complained of employment action(s) were the result of discriminatory conduct;

(2) identify all Respondents known to the complainant (i.e. the appointing power as well as all state employees alleged to have discriminated against the complainant), and identify the business address of each Respondent named as a party to the complaint. Unless the complainant names some other known Respondent, the Complainant's appointing power shall be considered the sole Respondent;

(3) have attached a copy of the Complainant's complaint of discrimination filed with the appointing power, together with a copy of the decision or other response of the appointing power to the complaint. If the appointing power failed to provide the Complainant with a written decision or other response to the discrimination complaint within the time period set forth in section 64.4, the Complainant shall so state in the complaint;

(4) specify the relief and/or remedies sought by the Complainant; and

(5) be limited to a maximum of 15 pages of double-spaced typed or printed text. Additional pages may be allowed upon a showing of good cause. The Complainant shall submit a separate document with the appeal stating the reasons for good cause. The 15 page limit does not apply to any documents attached to the appeal pursuant to the requirements of subdivision (3) of this section, or any other exhibits.

(d) The above procedures do not apply in those cases where a complaint raises discrimination as an affirmative defense to any case scheduled for hearing. A party who raises discrimination solely as an affirmative defense shall not be entitled to the relief specified in section 19702 of the Government Code, unless that party has also complied with all filing requirements set forth in sections 64.2 through 64.6.

2 CCR § 64.6 Acceptance of Complaint; Notice:

(a) If, after review of the complaint, the Appeals Division determines that the complaint does not meet all filing requirements, the Appeals Division shall notify the Complainant in writing of the reasons for its determination. The Complainant

may file an amended complaint within 20 days of receipt of the notice of rejection of the complaint.

(b) Upon acceptance of the complaint or amended complaint, the Appeals Division shall serve the operative complaint on the named Respondents by mailing a copy of the complaint to the legal office, or other designated office, of the appointing power, and to the business address of any individually named respondent.

Burdens of Proof at Hearing:

To establish a California Fair Employment and Housing Act (FEHA) claim for failure to make reasonable accommodation, an EMPLOYEE must show that, at the time of the alleged failure: (1) he had a disability of which the employer was aware; (2) he was able to perform the essential functions of the job at issue with or without accommodation, that is, that he was qualified individual; and (3) the employer failed to reasonably accommodate for his disability. (*McKenna v. Permanente Medical Group, Inc.* (E.D.Cal.2012) 894 F.Supp.2d 1258.)

An EMPLOYEE who brings a claim for failure to make a reasonable accommodation bears the burden of proving a reasonable accommodation was available, before the employer will be held liable under Government Code section 12940(n). (See *Forough Nadaf–Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952.)

An EMPLOYEE need NOT initially plead or produce evidence showing that the accommodation would not impose an undue hardship on the employer; rather, the burden is on the employer to make a showing of undue hardship. (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344.)